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Nos. 80-848; 80-883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HARTZELL PROPELLER, INC.,
and
PIPER AIRCRAFT COMPANY,
Petitioners,

v.

GAYNELL REYNO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

BRIEF FOR THE BOEING COMPANY, LOCKHEED CORPORATION, McDONNELL DOUGLAS CORPORATION, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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The Boeing Company, Lockheed Corporation, and McDonnell Douglas Corporation hereby respectfully move for leave to file the attached brief as amici curiae in this case. The consent of the attorney for the respondent and of the attorneys for the petitioners was requested but refused.

The interest of The Boeing Company, Lockheed Corporation, and McDonnell Douglas Corporation in this case arises from their business as manufacturers of commercial jet aircraft which are used worldwide. From time to time, these aircraft are involved in accidents in countries other than the United States. In the past decade, Boeing, Lockheed, and McDonnell Douglas have been subject to an increasing number of lawsuits

brought in the United States arising out of foreign aircraft accidents. Because much of the evidence is located abroad, the operator and other key actors are not parties to the American suit, and the attendance at trial of key foreign witnesses cannot be compelled, these cases are extremely difficult for the manufacturer to defend.

The doctrine of forum non conveniens has provided manufacturers with an important procedural safeguard against litigation which can more fairly be tried in foreign courts. However, in the instant case, the Court of Appeals concluded that a federal court could not dismiss any action on the basis of forum non conveniens where the dismissal would result in a change in the applicable law. *Reyno* v. *Piper Aircraft Co.*, 630 F.2d 149, 164 (3d Cir. 1980). This decision, if affirmed, will emasculate the doctrine of forum non conveniens since plaintiffs rarely choose to bring suits in a forum which will apply a less favorable law than another, more convenient forum.

The brief which amici curiae are requesting permission to file addresses important issues not heretofore considered by this Court concerning the relationship between the principles set forth in *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964), and the doctrine of forum non conveniens. If the argument of amici curiae is accepted, it would be dispositive of this case.

Respectfully submitted,

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PRELIMINARY STATEMENT

This matter presents important issues not previously addressed by this Court concerning the relationship between the

principles set forth in *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964), and the doctrine of forum non conveniens. Respondent is the personal representative of five Scottish citizens killed in an aircraft accident which occurred on a domestic Scottish flight. Petitioners are the American manufacturer of the aircraft and the American manufacturer of one of its components. The principal issue presented is the following:

Does this Court's decision in *Van Dusen* prevent a federal court from dismissing an action on forum non conveniens grounds whenever the American court would apply a law more favorable to the plaintiff than the law which would be applied in the jurisdiction where the matter could more conveniently be heard?

INTEREST OF AMICI CURIAE

Amici curiae are manufacturers of commercial jet aircraft which are used world-wide. From time to time these aircraft are involved in accidents in countries other than the United States. In the past decade, amici curiae have been subjected to an increasing number of lawsuits brought in the United States arising out of foreign aircraft accidents. These actions have been brought by claimants who have sought out or been sought out by American lawyers and have come to the United States seeking the more favorable law and more generous awards available here.

In addition to the burden placed on the American court system by having these large and complex cases tried here, these cases are frequently extremely difficult for an American manufacturer to defend. Much of the critical evidence as to liability and all of the evidence as to damages is located in a foreign country and is available to the American manufacturer either not at all or only after a cumbersome international discovery process which often requires diplomatic intervention. Attendance at trial of key foreign witnesses cannot be compelled. In contrast, the American manufacturers, when they have had actions moved to the convenient foreign forums, have generally agreed to make their witnesses and documents available in the foreign court.

Although these actions frequently are cast solely as product liability suits against the manufacturer, such casting is misleading. The airline or others involved in the maintenance, operation and control of the aircraft are not parties to the American suit may be due to any of several reasons: they may not be subject to jurisdiction in the United States; they may have limited liability by virtue of a treaty or internal statute or regulation of the foreign country; or, as in this case, an action against the operator may actually be pending in the foreign courts. Moreover, American products liability law is such that the plaintiff may prevail against the manufacturer without showing that the conduct of the manufacturer was a major contributing cause of the accident. Joint and several liability and expanded concepts of product liability for design defects, failure to warn, and failure to have warning or other safety devices can create a major exposure for the manufacturer for what is essentially an operational accident.[1] If these essentially "foreign" cases remain in the United States, the manufacturer is placed in the difficult position of having to defend its product in a suit to which the other key actors are not parties and the focus is unfairly placed upon the product. All of these problems can be avoided by trial in the foreign forum where the participation of all interested parties can easily be obtained. Thus, the courts have properly responded to the recent spate of imported litigation with a number of decisions dismissing these actions on the basis of forum non conveniens.[2]

Amici curiae have requested permission to submit this brief because they believe that the decision of the Court of Appeals,

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[1] *See, e.g., Chart* v. *General Motors Corp.*, 80 Wis.2d 91, 258 N.W.2d 680 (1977) (automobile manufacturer only 12 percent at fault required to pay entire judgment because operator of vehicle was insolvent); *Sun Valley Airlines* v. *Avco Lycoming Corp.*, 411 F.Supp. 598 (D. Idaho 1976) (operator 90 per cent at fault; manufacturer 10 per cent at fault).

[2] *See, e.g., Pain* v. *United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980); *Fosen* v. *United Technologies Corp.*, 633 F.2d 203 (2d Cir. 1980); *Dahl* v. *United Technologies Corp.*, 632 F.2d 1027 (3d Cir. 1980); *Macedo* v. *Boeing Co.*, Civ. Nos. 79-C-2488, 4771, and 4772 (N.D. Ill. Jan. 11, 1980), *appeal docketed*, No. 80-1559 (7th Cir. April 25, 1980); *Orr* v. *Boeing Co.*, CV-79-526 (C.D. Cal. April 23, 1979), *appeal docketed*, No. 79-3404 (9th Cir. July 19, 1979). *See also Bouvy-Loggers* v. *Pan American World Airways, Inc.*, 15 Av. Cas. 17,153 (S.D.N.Y. 1978).

if affirmed, will emasculate the doctrine of forum non conveniens and deprive manufacturers of an important procedural protection. The Court of Appeals concluded that a federal court could not dismiss any action on the basis of forum non conveniens where the dismissal would result in a change in the applicable law. 630 F.2d at 164. Since plaintiffs rarely choose to bring suits in a forum which will apply a less favorable law than another more convenient forum, the doctrine of forum non conveniens could rarely be invoked. Amici curiae believe that the rule enunciated by the Court of Appeals is not correct and should not be followed.

STATEMENT OF THE CASE

Amici curiae will not attempt to set forth herein a detailed statement of the facts and procedural history. These were described in detail in the petitions and will, no doubt, be adequately described in the briefs of the parties. The prior proceedings and the decisions below will, therefore, be discussed summarily.

I.

COMMENCEMENT OF THE ACTION AND TRANSFER

This action was originally commenced against defendants Piper Aircraft Company ("Piper") and Hartzell Propeller, Inc. ("Hartzell") in California state court by a person who was appointed personal representative of the decedents in California but who had no preexisting relationship with the decedents. The action was removed to the United States District Court for the Central District of California and defendants then moved to transfer the action to a federal court in Pennsylvania. The bases for the motions were that jurisdiction over Hartzell was lacking in California and that the convenience of parties and witnesses and the interests of justice favored trial in Pennsylvania rather than California which had no relationship to the transaction or the parties. The California federal court agreed with defendants and ruled that the actions should be transferred pursuant to 28 U.S.C. § 1404(a) to the Middle District of Pennsylvania.

II.

THE DISTRICT COURT'S DISMISSAL

After transfer, defendants moved, *inter alia*, to dismiss the action on the basis of forum non conveniens. The district court granted the motions and dismissed the action on the condition that defendants submit to jursidiction in Scotland and waive any defense based on the statute of limitations. *Reyno* v. *Piper Aircraft Co.*, 479 F. Supp. 727 (M.D. Pa. 1979).

In so ruling, the court analyzed the action in terms of the public and private interest factors set forth by this Court in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), and found that they "overwhelmingly point to dismissal." 479 F. Supp. at 731. Among those private interest factors that the court considered most significant were that "nearly all witnesses needed for the defense of this suit are located in the British Isles" (*id.* at 732), that "all evidence as to damages, both witnesses and documents, is located in Scotland" (*id.*), that "the only connection with [Pennsylvania] is the fact that the plane was manufactured [t]here over seven years before the accident" (*id.*), that "[t]he only contact with ... California is that Plaintiff's attorney and expert reside there" (*id.*), "[t]he unavailability of compulsory process to compel the attendance of witnesses necessary for complete and fair trial" (*id.* at 733), "[the] inability to implead parties located in" Scotland (*id.*), and that "[f]amiliarity with the topography around Tulla, Scotland and inspection of the wreckage of the plane would be aided by trial in the British Isles" (*id.* at 734).

The district court found that the public interest factors "even more strongly point to dismissal." *Id.* As recited by the district court, "[t]hese factors include court congestion, local interest in the lawsuit, court familiarity with the law that will govern the action, the avoidance of unnecessary problems and conflicts of law foreign to the court and the unfairness of burdening citizens in an unrelated forum with jury duty." *Id.* With respect to choice of law, the court noted that a trial in Pennsylvania "would be hopelessly complex and confusing for a jury as different laws will apply to different parties." *Id.* The

court found that under California conflict of laws applicable to the claim against Piper, Scottish law applied as to who could bring an action for wrongful death and Pennsylvania law applied with respect to the availability of an action based on strict liability in tort. *Id.* at 736. With respect to the claim against Hartzell, the court concluded that Scottish law applied to all issues. *Id.* at 737. Thus, having determined that Scottish law would govern part of the action, the court concluded that "it would be better for all parties for this case to proceed in a court in Scotland that is at home with the law of that country." *Id.*

The district court also addressed, and rejected, plaintiff's contention that the action should not be dismissed because the law of Scotland was not as favorable to her:

> That the law of Scotland is not as helpful to the real parties in interest is not a weighty consideration. We must determine which forum is proper because of convenience and the interests of justice and the decision cannot be correctly made if the amount of a plaintiff's likely award is given undue weight. Generally, the cases that have been dismissed on the ground of *forum non conveniens* all involve situations where a party enters a forum with the hope of seeking more liberal rules of recovery. If the foreign law that ought to govern a case does not protect its citizens as fully as the law of the dismissing forum, that is a matter to be dealt with in the foreign forum.

Id. at 738.

III.

THE COURT OF APPEALS' REVERSAL

The Court of Appeals reversed. *Reyno* v. *Piper Aircraft Co.*, 630 F.2d 149 (3d Cir. 1980). While the Court of Appeals disagreed with the district court on several points, the most significant difference, and the principal reason for the reversal, was with respect to the governing law. As noted, the district court had concluded that because Scottish law would apply to

at least some issues were the action to remain in Pennsylvania, and because there were difficulties associated with the application of different laws to the claims against the different defendants, the public interest favored dismissal of the action. The Court of Appeals, while apparently not disagreeing with the district court that Scottish law might apply to some issues,[3] concluded, contrary to the district court's analysis, that the strict liability law of Ohio would apply to the claim against Hartzell. 630 F.2d at 169-171 and especially n. 95. The court further concluded that because a Scottish court would not apply American strict liability law, dismissal on the basis of forum non conveniens was inappropriate: "[A] dismissal for forum non conveniens, like a statutory transfer, 'should not, despite its convenience, result in a change in the applicable law.'" *Id.* at 164.

SUMMARY OF ARGUMENT

In *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), this Court held that the decision to grant or deny a motion to dismiss an action on the ground of forum non conveniens is entrusted to the sound discretion of the trial judge, who must consider a number of factors, no one of which is necessarily

[3] The Court of Appeals' opinion is difficult to follow on this point. While the court states that "the negligence and damage limitations law of Scotland" would not apply (630 F.2d at 171), and that "the district court erred in concluding that foreign law would govern a substantial part of the case" (*id.*), it leaves open the issue of whether plaintiff had "representative capacity" without expressly disputing the district court's conclusion that this issue should be resolved by reference to Scottish law. Furthermore, while the Court of Appeals speaks of "damage limitations," there is no indication in the record that Scotland has any damage limitations as such. While the elements of recovery or the class of persons entitled to benefit from the award may be more restricted in Scotland, a long line of decisions has found that the law of the decedents' and beneficiaries' domicile has the greatest interest in these matters. *See, e.g., Junco* v. *Eastern Air Lines, Inc.*, 399 F.Supp. 666 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 310 (2d Cir. 1976); *Gordon* v. *Eastern Air Lines, Inc.*, 391 F. Supp. 31 (S.D.N.Y. 1975); *Bouvy-Loggers* v. *Pan American World Airways, Inc.*, 15 Av. Cas. 17,153 (S.D.N.Y. 1978); *Griffith* v. *United Air Lines*, 416 Pa.1, 203 A.2d 796 (1964). *Cf. In re Air Crash Disaster near Chicago, Illinois, on May 25, 1979*, 500 F. Supp. 1044, 1047-1048 (N.D. Ill. 1980), *rev'd on other grounds*, 16 Av. Cas. 17,122 (7th Cir. Jan. 5, 1981) ("[C]ompensatory damages probably are to be governed by the law of the domicile of the plaintiffs or their decedents.")

determinative. Previously, in *Canada Malting Co., Ltd.* v. *Paterson Steamships, Ltd.*, 285 U.S. 413 (1932), this Court had held that a dismissal on the basis of forum non conveniens may be entered even though the more convenient alternative forum will apply a law less favorable to the plaintiff. In spite of these precedents, the Court of Appeals in this case held that this Court's decision in *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964), precludes a federal district court from dismissing an action on the basis of forum non conveniens whenever the more convenient forum will apply a law less favorable to the plaintiff. By so ruling, the Court of Appeals created an exception to the forum non conveniens doctrine so large that the doctrine itself is swallowed. Thus, at issue in this case is the continued existence in the federal courts of the doctrine of forum non conveniens.

That the Court of Appeals' decision will encourage forum shopping for a favorable law is apparent. Furthermore, the decision is based on a misunderstanding of the principles involved in *Van Dusen*. In *Van Dusen*, this Court held that in a diversity action transferred from one federal district court to another under 28 U.S.C. § 1404(a), the substantive law of the transferor state should continue to apply. This holding was based on the *Erie* doctrine and was intended to assure that the "accident of federal diversity jurisdiction" did not result in the application of a different law than would have been applied by the state courts in the place where the action was filed. The Court of Appeals in this case turned *Van Dusen* on its head and established a rule that will not only leave litigation in inconvenient forums and promote rather than deter forum shopping, but will cause a *different* result to be reached in federal court than would have been reached in state court.

Because the decision of the Court of Appeals lacks any sound precedential or policy basis, it is incorrect and should be reversed.

ARGUMENT

THE COURT OF APPEALS ERRED IN GIVING DECISIVE WEIGHT TO ITS ASSUMPTION THAT A SCOTTISH COURT WOULD APPLY A LAW LESS FAVORABLE TO PLAINTIFF THAN THE LAW WHICH WOULD BE APPLIED BY AN AMERICAN COURT

The paramount reason for the Court of Appeals' reversal of the district court's dismissal of the action was that

> the dismissal would work a change in the applicable law so that plaintiff's strict liability claim would be eliminated from the case. . . . [A] dismissal for forum non conveniens, like a statutory transfer, "should not, despite its convenience, result in a change in the applicable law." Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified.

630 F.2d at 163-164 (footnote omitted). This conclusion was based on the same court's prior opinion in *DeMateos* v. *Texaco, Inc.*, 562 F.2d 895 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978), which, in turn, was purportedly based on this Court's decision in *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964).

Amici curiae believe that both *DeMateos* and the decision of the Court of Appeals in this case reflect a fundamental misunderstanding of this Court's holding in *Van Dusen* and the policy reasons for that holding. *Van Dusen*, like the present case, arose out of an aircraft accident. However, in *Van Dusen, unlike* the present case, the action was originally brought in the plaintiffs' and decedents' home state, which was also the destination of the flight. There was no element of forum shopping involved and no suggestion that the actions met the test for a forum non conveniens dismissal. Rather, the actions were transferred from one appropriate forum (Pennsylvania) to another appropriate and more convenient forum (Massachusetts). As this Court noted in *Van Dusen*, "the most convenient forum is frequently the place where the cause of action arose."

376 U.S. at 628. The transfers did not involve a forum non conveniens dismissal but rather were made pursuant to a federal statute (28 U.S.C. § 1404(a)) which had previously been construed by this Court "to permit courts to grant transfers upon a lesser showing of inconvenience." *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 32 (1955).

In *Van Dusen*, this Court held that on the facts before it the transferee court must apply the same law as the transferor court would have applied, including its choice of law rules. 376 U.S. at 639. This result was required by the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). As this Court stated:

> We believe, therefore, that both the history and purposes of § 1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms.
>
> Although we deal here with a congressional statute apportioning the business of the federal courts, our interpretation of that statute fully accords with and is supported by the policy underlying *Erie R. Co.* v. *Tompkins*, 304 U.S. 64.... As this Court said in *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109:
>
> > "*Erie R. Co.* v. *Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts.... The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of a State court a block away should not lead to a substantially different result."
>
> Applying this analysis to § 1404(a), *we should ensure that the "accident" of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed.* This purpose would be defeated in cases such as the present if nonresi-

> dent defendants, properly subjected to suit in the transferor State (Pennsylvania), could invoke § 1404(a) to gain the benefits of the laws of another jurisdiction (Massachusetts). What *Erie* and the cases following it have sought was identity or uniformity between federal and state courts; and the fact that in most instances this could be achieved by directing federal courts to apply the laws of the States "in which they sit" should not obscure that, in applying the same reasoning to § 1404(a), the critical identity to be maintained is between the federal district court which decides the case and the courts of the State in which the action was filed.

376 U.S. at 636-639 (footnotes omitted; emphasis added).

The *Van Dusen* actions would not have been dismissed on forum non conveniens grounds by a Pennsylvania state court, and the plaintiffs in those actions would have been entitled to have their claims decided by a Pennsylvania state court under Pennsylvania law, including its conflict of laws rules. Thus, *Erie* and its progeny required that the federal courts also apply Pennsylvania law, including its conflict of laws rules, to the actions properly filed in Pennsylvania federal court but transferred pursuant to "a federal statute apportioning the business of the federal courts."

The present case is not the same as *Van Dusen*, however, and to the extent that the *Erie* doctrine is relevant to this case, it supports a result exactly opposite to that reached by the Court of Appeals here. This suit was brought in California, a jurisdiction whose only contact with any of the parties or the transaction at issue was the fact that one of the defendants was apparently subject to suit there. Thus, California was plainly an inconvenient forum and, had the action remained in the California state courts, a dismissal on the grounds of forum non conveniens would have been a certainty. *See, e.g., Hemmelgarn* v. *Boeing Co.*, 106 Cal. App. 3d 576, 165 Cal. Rptr. 190 (1980); *Gould, Inc.* v. *Health Science, Inc.*, 54 Cal. App. 3d 687, 126 Cal. Rptr. 726 (1976); *Great Northern Ry. Co.* v. *Superior Court*, 12 Cal. App. 3d 105, 90 Cal. Rptr. 461 (1970). Moreover, the fact of critical significance to the Court of Appeals—that the foreign court would not apply a law as

favorable to plaintiff as that which the California courts would apply—would not have prevented the California courts from dismissing this action on forum non conveniens grounds. In *Hemmelgarn,* which like the present case involved an action on behalf of foreign nationals arising out of a foreign aircraft accident, the court assumed that a change in the applicable law might result from the dismissal but dismissed the action nonetheless:

> The difficulty with the present case is that it is not possible to satisfy all of California's policy considerations by retaining the case here and it is equally impossible to satisfy all those policy considerations by requiring trial in Canada. In either situation some policy trade-offs are necessary which the court must consider in the exercise of its discretion.
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> Here, accepting plaintiffs' premise on damages as true, . . . and although defendants Rohr and Boeing may not feel the full sting of damages as computed in accordance with California law, they nevertheless will feel some sting from the damages imposed by the Canadian court.

165 Cal. Rptr. at 197.[4]

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[4] *See also Archibald* v. *Cinerama Hotels,* 15 Cal. 3d 853, 544 P.2d 947, 126 Cal. Rptr. 811 (1976). *Archibald* was a class action against a number of Hawaii hotels. The trial court dismissed the action on the ground of forum non conveniens. On appeal plaintiff contended that forum non conveniens was inapplicable because there was no suitable alternative forum. The basis for this contention was that Hawaii class action procedures were less favorable to plaintiff than those of California. The California Supreme Court rejected this contention, stating:

> We do, however, address one argument presented by plaintiff since its determination would preclude the exercise of *any* discretion by the trial court in the matter.
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> Plaintiff argues that defendants have failed to show the existence of a suitable alternative forum (see *Gulf Oil Co.* v. *Gilbert, supra,* 330 U.S. 501, 506-507, 67 S.Ct. 839, 91 L.Ed. 1055), and consequently that the trial court lacks the discretion to stay proceedings in California.
>
> Plaintiff's argument rests on a comparison of class action procedures in California and Hawaii.
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> • • •
>
> Any attempt on our part to predict how Hawaiian courts will resolve unsettled issues of class action procedure would be purely speculative. But, *contrary to plaintiff's contention, the existence of unsettled questions of Hawaiian procedure does not compel the trial court to conclude as a matter of law that Hawaii is not a suitable alternative forum.*

15 Cal. 3d at 861-862 (footnote omitted; emphasis added).

This review of California law demonstrates that the rule adopted by the Third Circuit in this case frustrates rather than furthers the *Erie* principles which underly *Van Dusen*. Unlike *Van Dusen*, where the effect of continued application of the law of the transferor forum was that the same law would be applied by the state and federal forums, in the present case the effect of a refusal to dismiss the action on the ground of forum non conveniens is not only to leave the action in an inconvenient forum but to achieve an entirely different result in the federal court than would have been reached in the state court. This action would have been dismissed by the California state courts on the ground of forum non conveniens and plaintiff would have lost any opportunity to have California choice of law rules apply.[5] *Van Dusen* does not require the federal courts to reach a different result. Indeed, the tenor of *Van Dusen* is precisely the opposite.

One point should be emphasized. Amici curiae do not contend that forum non conveniens dismissals in diversity cases must be resolved by reference to state law. This issue was left

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[5] This fact also casts doubt upon the conclusion of both lower courts that as to the claim against Piper California law would necessarily apply after a § 1404(a) transfer. If the California state courts would have dismissed this action on forum non conveniens grounds—thereby defeating plaintiff's attempt to invoke California law—*Van Dusen* does not require a different result in federal court. This point was expressly recognized by this Court in *Van Dusen*:

> . . . [W]e do not and need not consider whether in all cases § 1404 (a) would require the application of the law of the transferor, as opposed to the transferee, State. We do not attempt to determine whether, for example, the same considerations would govern if . . . it was contended that the transferor State would simply have dismissed the action on the ground of forum non conveniens.

376 U.S. at 639-640 (footnotes omitted).

The Court of Appeals cited one case, *In re Air Crash Disaster at Boston, Mass*, 399 F. Supp. 1106, 1121-1122 (D. Mass. 1975), in support of its position that California law still applied. In *Boston*, the court concluded that it would be inappropriate to apply the law of the transferee forum because:

> An assumption that a plaintiff, after dismissal, would choose to bring his action in the transferree forum is plainly unjustified in any case in which another more favorable forum is open to him.

Id. at 1121.

This logic is questionable. There is no reason to give a forum shopping plaintiff the benefit of the doubt that he or she could shop for and find a forum less inconvenient than the original choice but with a choice of law rule more favorable than the rule followed in the convenient forum to which the action was transferred.

open by this Court in *Gulf Oil* and *Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), and the lower federal courts have tended to consider the propriety of such dismissals a matter of federal law. *See e.g., Thomson* v. *Palmieri*, 355 F.2d 64, 66 (2d Cir. 1966); *Szantay* v. *Beech Aircraft Corp.*, 349 F.2d 60, 65 (4th Cir. 1965); *Grodinsky* v. *Fairchild Industries, Inc.*, Civ. No. M-80-722 (D.Md. Feb. 3, 1981); *Poe* v. *Marquette Cement Mfg. Co.*, 376 F. Supp. 1054 (D.Md. 1974); *Lapides* v. *Doner*, 248 F. Supp. 883 (E.D.Mich. 1965); *Ciprari* v. *Servicos Aereos Cruzeiro do Sul*, S.A., 232 F. Supp. 433, 442 (S.D.N.Y. 1964). Thus, the absence of a state law doctrine of forum non conveniens would not preclude a federal court from dismissing a diversity action on this basis since many of the factors involved in the decision whether to grant a forum non conveniens dismissal are matters of federal concern.[6] Similarly, it can at least be argued that a federal court need not dismiss on forum non conveniens grounds a diversity action which would have been dismissed in state court, at least to the extent that factors such as court congestion, not present in a particular federal court but present in state court, would have been a major reason for the latter's decision to dismiss the action, had it been brought there. *Cf. Parsons* v. *Chesapeake & O.R. Co.*, 375 U.S. 71, 73 (1963) (federal court need not transfer under 28 U.S.C. § 1404(a) an action based on federal law even though state court had dismissed identical action based on forum non conveniens; Court noted, "there is nothing to show that the problem in the federal court in Chicago [of "docket congestion"] is identical . . . to the problem in the Cook County court system").

In any event, complicated hypothetical conflicts between state and federal law need not be resolved here. In the present case all parties agreed, and the Court of Appeals found, that no difference exists among California, Pennsylvania and federal forum non conveniens principles, *see* 630 F.2d at 158. Thus the question of what law controls if there is a conflict can be resolved another day. Under the *Gulf Oil* factors used by all

[6] The converse situation, a state court dismissal of a federal claim by application of the state's standards for forum non conveniens dismissals, was approved in *Douglas* v. *New York, N.H. & H.R. Co.*, 279 U.S. 377 (1929).

three jurisdictions, problems of foreign law and conflict of laws have been held to be relevant in two ways to the trial court's discretionary decision whether to dismiss a case on forum non conveniens grounds. *First*, there is a public interest "in having the trial . . . in a forum that is at home with the . . . law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Gulf Oil*, 330 U.S. at 509. *Second*, the lower federal courts have not suggested that the new forum must afford precisely the same protection to a plaintiff as the inconvenient forum but have held only that the law and procedures which would be applied by the new forum must not be so devoid of due process that plaintiff would be deprived of "an adequate alternative forum." *See, e.g., Shields* v. *Mi Ryung Construction Co.*, Civ. No. 79-628 (S.D.N.Y. Feb. 21, 1981); *Alcoa S.S. Co., Inc.* v. *M/V Nordic Regent*, 636 F.2d 860, 871-872 (2d Cir. 1980) (en banc).

The public interest in avoiding problems associated with conflict of laws and application of foreign law strongly supports the dismissal of this action. The transaction giving rise to this litigation is centered in Scotland and, as apparently conceded by all parties and found by both courts, the Scottish courts would probably apply Scottish law. In contrast, this case presents to an American court "a classic example of the wilderness in which courts sometimes find themselves when searching for solutions to problems arising under the judicial nightmare known as Conflict of Laws." *Forsyth* v. *Cessna Aircraft Co.*, 520 F.2d 608, 609 (9th Cir. 1975).[7] Furthermore,

[7] It is difficult to imagine a case which better illustrates how "tangled" some problems in conflict of laws can be. The district court concluded that Pennsylvania choice of law doctrine required application of Scottish law to the issue of whether a cause of action in strict products liability existed. The Court of Appeals disagreed, holding that the Pennsylvania approach to conflict of laws was similar to the California "interest analysis" approach and that under "interest analysis" Ohio had an interest in applying strict liability to its resident manufacturer whereas Scotland had no interest in making it more difficult for its residents to recover by requiring that they prove negligence. Thus, there was a threshold dispute among the Pennsylvania judges who heard this case as to what is the current Pennsylvania approach to choice of law.

(footnotes continued on following page)

even if some American law would be applied by an American court to some issues, other issues related to the damages would still appear to be governed by Scottish law.[8]

This is also not a case where the law that would be applied by the foreign country is such that plaintiff would be deprived of an adequate alternative forum. Scotland is the home of the real parties in interest and the substantive law and procedural protections in Scotland are not at all dissimilar to our own. The critical difference perceived by the Court of Appeals between

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(footnotes continued from preceding page)

Furthermore, assuming the Court of Appeals was correct that "interest analysis" is the correct approach, the proper analysis of the various states' interests is itself far from clear. The Third Circuit concluded that application of the Ohio and Pennsylvania doctrines of strict tort liability for defective products would serve those states' "interest in the regulation of manufacturing." 630 F.2d at 168. However, exactly the opposite conclusion was reached by Judge Friendly in *George* v. *Douglas Aircraft Co.*, 332 F.2d 73 (2d Cir.), *cert. denied*, 397 U.S. 904 (1964). He held that the interest of the state of manufacture was in having its products enter foreign states on the same terms as products manufactured elsewhere:

> [I]t would seem quite irrational that the victim's recovery on a theory of strict liability should depend upon whether or not the state where the plane was manufactured had chosen so to provide with respect to accidents as to which it had primary concern. Extra-state manufacturers are not entitled to have their goods enter a state on easier terms as to liability than the state establishes generally; they are as able as the intra-state manufacturer to provide for their own protection by insurance or self-insurance. *Even more clearly* if a state has decided in general that persons injured within its borders by a particular kind of defective chattel should not be allowed to recover against the manufacturer except for negligence, there would be little reason to accord a greater degree of protection because the chattel causing the injury was made in another state which has shown a broader concern for the general welfare of its citizens by imposing strict liability.

332 F.2d at 77 (emphasis added). At least one Pennsylvania judge has employed reasoning quite similar to Judge Friendly. *See Harrison* v. *Wyeth Laboratories*, No. 79-2788 (E.D. Pa. July 1, 1980).

Finally, since the Court of Appeals thought that Ohio had an interest in the application of its law to Hartzell, it is relevant how Ohio itself perceives its interest. *See* Restatement (Second) of Conflict of Laws § 8, Comment k. In *Michell* v. *General Motors Corp.*, 439 F. Supp. 24, 27-28 (N.D. Ohio 1977), an experienced Ohio judge concluded that Ohio had no interest in the application of its strict liability doctrine to a case involving a Canadian accident and Canadian plaintiffs.

[8] As the district court noted, "[w]e are relegated to this less than complete analysis [of the conflicts between Pennsylvania and Scottish law] because of our unfamiliarity with Scottish law which in itself is a factor supportive of dismissal of the action." 479 F. Supp. at 735.

trial in Pennsylvania and trial in Scotland is that while strict liability would be available in Pennsylvania, plaintiff must prove negligence in order to recover in Scotland. This is hardly the kind of difference which would deprive the plaintiff of a fair trial in Scotland.[9] Much more fundamental objections to the adequacy of the foreign forum were made in *Shields* and *Alcoa* and rejected.

There is no federal rule automatically precluding a forum non conveniens dismissal merely because the forum in which the action must be refiled would apply a different law to the plaintiff's claim. Indeed, this Court has expressly rejected such a rule. In *Canada Malting Co., Ltd.* v. *Paterson Steamships, Ltd.*, 285 U.S. 413 (1932), this Court affirmed a dismissal on forum non conveniens grounds of a suit in admiralty notwithstanding libellants' assertion that a Canadian court would, by application of a different choice of law rule, apply Canadian law which would not have created joint and several liability in favor of libellants. Libellants' assertion as to the content of Canadian choice of law doctrine was disputed, but this Court stated:

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[9] Significantly, the plaintiff's allegations here involve primarily defects in design and inadequate warnings. *See* 630 F.2d at 154 n.2. In a design defect or failure to warn case it is doubtful that there should be *any* difference between strict liability and negligence. Certainly there is no difference under Ohio law which the Court of Appeals held applicable to Hartzell. *See Temple* v. *Wean United, Inc.*, 50 Ohio St. 2d 317, 364 N.E.2d 267, 272-273 (1977):

> We have thus far discussed appellees' liability in terms of strict tort liability. It is, however, apparent that the rule imposing obligation on the manufacturer or seller to give suitable warning of a dangerous propensity of a product is a rule fixing a standard of care, and any tort resulting from the failure to meet this duty is, in essence, a negligent act.
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> * * *
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> To date, no Ohio case has specifically defined the duties of a manufacturer relative to product design, but the general rule is that " . . . [i]t is the duty of a manufacturer to use reasonable care under the circumstances to so design his product as to make it not accident or foolproof, but safe for the use for which it is intended." *Gosset* v. *Chrysler Corp.* (C.A.6, 1966), 359 F.2d 84, 87.
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> The law in other jurisdictions is similar. *See e.g., Robinson* v. *Reed-Prentice Division of Package Machinery Co.*, 49 N.Y.2d 471, 479, 403 N.E.2d 440, 443, 426 N.Y.S.2d 717, 720 (1980). ("Since no product may be completely accident proof, the ultimate question in determining whether an article is defectively designed involves a balancing of the likelihood of harm against the burden of taking precaution against that harm.")

> We have no occasion to enquire by what law the rights of the parties are governed, as we are of the opinion that, under any view of that question, it lay within the discretion of the District Court to decline to assume jurisdiction over the controversy.

285 U.S. at 419-420. *Accord, Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976); *Anglo-American Grain Co.* v. *The S/T Mina D'Amico*, 169 F. Supp. 908 (E.D. Va. 1959). As the Second Circuit held in *Fitzgerald*:

> A district court has discretion to dismiss an action under the doctrine of *forum non conveniens*, however, even though the law applicable in the alternative forum may be less favorable to the plaintiff's chance of recovery. A contrary holding would emasculate the doctrine, for a plaintiff rarely chooses to bring an action in a forum, especially a foreign one, where he is less likely to recover.

521 F.2d at 453 (citation omitted).

It is thus apparent that the position taken by the Court of Appeals in this case concerning the test for a forum non conveniens dismissal is not supported by *Gulf Oil*, is contrary to *Canada Malting*, and is at odds with, rather than compelled by, the federalism principles involved in *Van Dusen*. Indeed, the rule enunciated by the Third Circuit can only have the effect of encouraging the sort of forum shopping which occurred here. To encourage forum shopping by allowing plaintiff to pick his law at will and hold on to it forever is most definitely *not* the public policy this Court sought to promote in *Van Dusen*. Indeed, even before *Van Dusen* was decided, the proper scope of the *Van Dusen* principle was analyzed by the Second Circuit in *H.L. Green Co.* v. *MacMahon*, 312 F.2d 650 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963). That decision is instructive.

H.L. Green was an action commenced in the Southern District of New York in which the plaintiff, a New York corporation, alleged violations of § 10(b) of the Securities Exchange Act and common law fraud. The defendant moved to have the action transferred to the Southern District of Alabama under § 1404(a) and the motion was granted. In its

petition to the Second Circuit for a writ of mandamus prohibiting the transfer, plaintiff asserted that the transfer would not be in the interests of justice, in part because its effect would be that Alabama law, which was less favorable than New York law, would be applied to the common law claim. Anticipating *Van Dusen*, the Court of Appeals for the Second Circuit refused to grant the writ noting that, because of *Erie*, New York law (including, as to the common law claim, its conflict of laws rules) should continue to apply. 312 F.2d at 652-653. However, this Court went to some length to emphasize that when federalism considerations were put aside a plaintiff does not have an unfettered right to shop for the most favorable law:

> A plaintiff may not resist the transfer of his action to another district court on the ground that the transferee court will or may interpret federal law in a manner less favorable to him. We agree with the Court of Appeals for the Fourth Circuit that if there is a conflict of views among circuits, "this presents a matter for consideration by the Supreme Court on application for certiorari, not for consideration by a district judge on application for transfer * * *. *We have no sympathy with shopping around for forums.*" *Clayton* v. *Warlick*, 232 F.2d 699, 706 (4 Cir. 1956); *see Torres* v. *Walsh*, 221 F.2d 319 (2 Cir.), *cert. denied*, 350 U.S. 836, 76 S.Ct. 72, 100 L.Ed. 746 (1955).

312 F.2d at 652 (emphasis added). *Accord, Scheinbart* v. *Certain-Teed Products Corp.*, 367 F. Supp. 707, 710-711 (S.D.N.Y. 1973):

> Plaintiff argues that the interests of justice will be served by trial in New York because the Second Circuit Court of Appeals, in *Rosenfeld* v. *Black*, 445 F.2d 1337 (2d Cir. 1971), has held that the Advisers Act prohibits an investment advisor from profiting by the sale of its fiduciary office. Plaintiff claims that since the law in the Third Circuit is unclear on this issue, she "should not be required to litigate her cause [there] and to shoulder the burden of seeking to establish the standard applied in *Rosenfeld* in another jurisdiction."

> Plaintiff's argument amounts to mere forum shopping. The federal courts, and this court in particular, have little sympathy for forum shopping. . . . *Plaintiff's obvious forum shopping merely adds weight to the other considerations favoring transfer.*

(Footnotes omitted; emphasis added.) *See also In re Pittsburgh & L.E. R. Co. Securities and Antitrust Litigation*, 543 F.2d 1058, 1065 n.19 (3d Cir. 1976); *Clayton* v. *Warlick*, 232 F.2d 699, 706 (4th Cir. 1956).

The lesson of these decisions is clear: There is a federal policy against forum shopping such that when continued application of the law of the transferor state is not required to effectuate *Erie* principles, the plaintiff will not be allowed to hold on to a favorable law for which he has shopped in an inconvenient forum. In the present case, plaintiff's effort to avoid dismissal because a slightly less favorable law will be applied in the more convenient forum is not only contrary to this federal policy against forum shopping, but is inconsistent with, rather than compelled by, *Erie* principles.

CONCLUSION

For the reasons stated, the order of the Court of Appeals for the Third Circuit reversing the district court's order dismissing this action, with conditions, on the ground of forum non conveniens should be reversed and the matter remanded to the Court of Appeals with directions to reinstate the district court's order of dismissal.

RESPECTFULLY SUBMITTED this 9th day of May, 1981.

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